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IN THE
Supreme Court of the United States

October Term, 1979

No. 79-1

AMERICAN EXPORT LINES, INC.,

Petitioner,

v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF

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IN THE

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NO. 79-1

AMERICAN EXPORT LINES, INC.,
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v.

GILBERTO ALVEZ and
JOSEPH VINAL SHIP MAINTENANCE, INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT

RESPONDENTS' BRIEF

Questions Presented for Review

1. May the wife of a harborworker seriously injured while working aboard a ship in the navigable waters of New York Harbor recover damages under the Maritime Law for loss of her husband's consortium?

2. Where there is lack of unanimity among the federal courts as to a question of Maritime Law, may the highest court of a state interpret that law in accordance with principles set

down by this Court, or is it bound to apply the law as set forth in an earlier decision of the Court of Appeals of the Circuit in which that state is located?

Statement

While working aboard petitioner's vessel in the territorial waters of the State of New York as a lasher, Gilberto Alvez was struck in the eye by a defective tension jack. He sustained serious injuries, including the loss of his right eye and a severe depressive reaction. He sought to amend his complaint to allege a cause of action on behalf of his wife, Juanita, for loss of her husband's consortium. This motion was denied by Special Term. On appeal, the New York State Supreme Court, Appellate Division, First Department, reversed on the law and granted the motion to amend the complaint.

The New York State Court of Appeals affirmed, permitting the cause of action of Juanita Alvez to be submitted to a jury along with that of her husband, based on a claim of both unseaworthiness and negligence.

Historical Background

The first reported case involving the question of recovery for damages for loss of consortium under the maritime law is *New York and Long Branch Steamboat Co. v. Johnson,* 195 F. 740 (3rd Cir. 1912), which permitted the husband of a passenger injured on a ship to recover damages for his wife's consortium. Fifty-one years later in *Igneri v. Cie de Transports Oceaniques,* 323 F.2d 257 (2nd Cir. 1963) the same remedy was denied the wife of an injured longshoreman. There had been no intervening decision of the Supreme Court, yet certiorari was denied (376 U.S. 949). The *Igneri* opinion relied on a decision of this Court in *The Harrisburg,* 119 U.S. 199.

Seven years after the decision in *Igneri,* in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court broke

the shackles of *The Harrisburg* by declaring that in keeping with the liberal objectives of the maritime law it did have the power to expand the rights of maritime workers and their dependents. Having recognized the dynamic, flexible quality of the maritime law in *Moragne,* four years later this Court was called upon to decide whether the remedy for maritime wrongful death should include non-pecuniary losses such as loss of companionship and consortium, in *Sea-Land Services, Inc. v. Gaudet,* 414 U.S. 573, 94 S.Ct. 806, 39 L.Ed. 9 (1974). Petitioner in that case argued that maritime law did not allow recovery for non-pecuniary losses. The case relied on by petitioner for that proposition was *Igneri*, the same case relied on by petitioner here. *Igneri* had held that diminution of the value of the husband's society and affections were elements too intangible to be measured by a jury. This Court rejected that view, citing with approval *New York and Long Branch Steamboat Co. v. Johnson, supra,* and *Benedict on Admiralty*, 366 (6th Edition 1940). *Igneri* was mentioned only as holding a contrary view.

At the time of the *Gaudet* decision, 27 out of 44 states which had passed on the question allowed recovery for loss of the husband's society in personal injury cases, as opposed to 12 in 1963 when *Igneri* was decided. That majority has now swelled to 37 (A12-A13, Footnote 4).[1]

Both *Moragne* and *Gaudet* involved deaths which occurred within the territorial waters of a state. More recently, in *Mobil Oil Corporation v. Higginbotham,* 436 U.S. 618 (1978), this Court was confronted with the question as to whether to allow damages for loss of consortium and society where death had occurred beyond the three-mile limit. Recovery was denied on the basis that to allow such damages would run directly contrary to the Death on the High Seas Act, 46 U.S.C. 761, which allows damages only for pecuniary losses.

The *Higginbotham* opinions, both the majority one and the dissenting opinion of Justice Marshall, make it crystal clear that

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1. Numbers in parentheses refer to pages in Appendix.

loss of consortium and loss of society may be recovered for when the injury occurs within the three-mile limit, and that this determination, reached in *Gaudet,* followed both "the humanitarian policy of the maritime law" and the "clear majority of states," both of which favored recovery for loss of society. *Id.* at page 622.

After the *Gaudet* decision, a California appellate court was called upon to decide whether a longshoreman's wife should be permitted to recover damages for loss of consortium of her injured husband in *Pesce v. Summa Corp.,* 54 Cal. App. 3rd, 86, 926 Cal. Rptr. 451 (1975). The holding of that court succinctly stated:

> "Since we can perceive no logical, sound or reasonable basis to differentiate between the case where the husband is killed, as opposed to injured, in respect to the wife's entitlement to recover for loss of consortium, we conclude that Igneri has been overruled by Sea-Land Services as construed by Skidmore."

The Chief Judge of the United States District Court for the Southern District of Georgia, in passing on the same issue, stated:

> "I am unable to see the rationality of a rule that if a defendant's negligence causes death, consortium can be recovered by the widow, but where only injury results, a wife cannot. I perceive no difference in the nature of suits for wrongful death and for tortious injury justifying so bizarre and inconsistent a result. A wife may be damaged as much as a widow by the loss of her husband's society, affection, companionship and sexual congress." *Lemon v. Bank Lines, Ltd.,* 411 F.Supp. 677 (1976).

Shortly after the *Lemon* case was decided, the Court of Appeals denied the right of the wife of a Jones Act seaman to recover for loss of her husband's consortium, in *Christofferson v. Halliburton Co.,* 534 F.2d 1147 (5th Cir. 1976). Judge Lawrence interpreted this decision as requiring him to reverse

his determination in *Lemon,* even though Lemon was a longshoreman.

In August of 1976, Special Term denied Alvez' motion to amend his complaint so as to add a claim by his wife for loss of consortium, relying on *Igneri.* Thereafter, judges of the district courts in New York appear to have been about equally divided as to whether *Igneri* was overruled by *Gaudet.* Compare *Giglio v. Farrell Lines, Inc.,* 424 F.Supp. 927 (S.D.N.Y. 1977), appeal denied (2nd Cir., Feb. 17, 1977) with *Westcott v. McAllister Bros., Inc.,* 463 F.Supp. 1039 (S.D.N.Y. 1978).[2]

Summary of Argument

Three cases decided by this Court within the last ten years are dispositive of the issue as to whether the spouse of a gravely injured harbor worker may recover for lost consortium as a result of injuries sustained by her husband on territorial waters. These cases are *Moragne, Gaudet* and *Higginbotham.*

Moragne is important because it reaffirmed the duty and power of this Court to fashion remedies for those injured on navigable waters, and because it restated the long-standing policy of the maritime law to be liberal and humane, and to grant the remedy rather than deny it when not required to withhold it by established and inflexible rules. 398 U.S. at 387.

Gaudet is important because it, too, reaffirmed the solicitude of admiralty for those injured within its jurisdiction, and because it rejected the reasons assigned in *Igneri* for denying a recovery for loss of consortium of maritime employees.

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2. Other cases, reflecting a split of opinion both in the Second Circuit and elsewhere, are cited at pages 24-30 of petitioner's brief. For a most recent case allowing the remedy in the District of Maryland, see the scholarly opinion of Judge Kaufman filed on December 17, 1979, in the cases of Kozoidek v. Gearbulk Ltd., et al., Civil K-77-52; *Johnson v. Atlantic Container Lines, Ltd., et al.,* Civil K-78-164 and *Houston, et al., v. Murmansk Shipping Company,* K-78-1373.

Higginbotham is important because it reaffirmed the holding of *Gaudet* that the right to recover for loss of consortium does exist within the territorial waters, though not where death occurs on the high seas. Since longshoremen and harborworkers are seldom, if ever, injured or killed on the high seas, *Higginbotham* recognized a lack of uniformity between the rights of seamen's wives and that of longshoremen's and harbor workers'.

Contrary to petitioner's claim that affirmance here will destroy uniformity in the maritime law, the decision of the Court of Appeals in no way adds to the lack of uniformity already recognized to exist in *Higginbotham.* on the contrary, affirmance will tend to promote uniformity of remedy among those injured while working in territorial waters.

The petitioner's brief is less an assault on the holding below than it is an effort to turn back the clock of progress and overrule the decisions of this Court in *Gaudet, Moragne* and *Higginbotham.* Because of the broad scope and blunderbuss approach of petitioner's brief, certain of the arguments, such as that concerning parity of treatment between seamen and harborworkers, will be discussed briefly, though they are actually irrelevant after *Higginbotham.* On the other hand some arguments, clearly irrelevant, such as the attack on *Gaudet's* handling of a res judicata issue not present in this case, will be ignored, lest discussion further obfuscate the simple issue of the right of Juanita Alvez to recover for loss of consortium.

This brief will also reply to an argument raised for the very first time before this or any other court in the brief of respondent Vinal that Juanita Alvez claim is barred by 33 U.S.C. 833(a).

ARGUMENT

POINT I

THE DECISION OF THE COURT OF APPEALS FOLLOWED THE LAW AS SET FORTH BY THIS COURT IN *SEA-LAND SERVICES v. GAUDET,* 414 U.S. 573.

This Court in *Gaudet* clearly declared that recovery could be allowed under the maritime law for loss of consortium. If petitioner is to distinguish this case from *Gaudet,* it can only be on the basis that the law should somehow be different in a death case from that in a case where the injured person survives. Such cannot be correct, for the very reason that impelled this Court to hold as it did, not only in *Gaudet,* but in *Moragne* and *Higginbotham* as well.

In *Moragne* this Court, in holding that there was a right to recover for death in a case otherwise governed by the General Maritime Law, held that the *primary* wrong giving rise to the remedies was the injury caused to the decedent. Thus, the Court stated, 398 U.S. at pages 381-382:

> "Where existing law imposes a primary duty violations of which are compensable if they cause injury, nothing in ordinary notions of justice suggests that a violation should be non-actionable simply because it was serious enough to cause death. On the contrary, that rule has been criticized ever since its inception, and described in such terms as 'barbarous', e.g., *Osborne v. Gillett,* 8 L.R. Exch. 88, 94 (1873) (Lord Bramwell, dissenting); Pollock, *The Law of Torts* 55 (Landon ed. 1951);; 3 Holdsworth, *History of English Law,* 676, 677 (3rd ed. 1927). Because the primary duty already exists, the decision whether to allow recovery for violations causing death is entirely a remedial matter."

The Court went on to state that since the primary source was the injury to the person itself, whether the person lived or

died was only a matter of remedy deriving secondarily from the primary cause. It found no difficulty in altering the remedy so as to give, by necessary logic, the same remedy that would otherwise have been given in the event the injury were not fatal.

In *Moragne* the Court did not specify all the damages that would be recoverable by reason of the primary injury, but in *Gaudet* the Supreme Court stated specifically that included in the right of loss of society granted in a fatal case was the right to recover for the loss of consortium. Again, bearing in mind what was stated in *Moragne* this right could only exist as the right also existed in a non-fatal case. Indeed, as pointed out above, the petitioner in *Gaudet* argued that maritime law did not allow recovery for non-pecuniary losses, relying on *Igneri.*

Petitioner argues that *Gaudet*, since it involved wrongful death, has no applicability to maritime personal injury actions. This argument cannot withstand logical scrutiny. It is based on two sentences from the opinion of Mr. Justice Brennan, taken out of context, which are seized upon to support an argument that recovery for loss of society cannot occur in the absence of death. To evaluate the language of the opinion, it is necessary to consider the background of the case and the unique problems of *res judicata* which were involved. Gaudet, a longshoreman, sued during his lifetime for serious personal injuries, and recovered a substantial jury verdict. His wife was not a party to that suit. The holding of the Court of Appeals, *Gaudet v. Sea Land Services,* 463 F.2d 1331, 1333 was that the jury verdict recovered by Mr. Gaudet during his lifetime did not include damages done to others by his death, which had not yet occurred.

Mrs. Gaudet sued only for her husband's death. Her failure to claim damages for loss of consortium during her husband's lifetime was probably a decision consciously made so as not to weaken her collateral estoppel position. This proved to be sound strategy, for the Court of Appeals acknowledged that the majority rule bars the right to recover damages where decedent, at the time of death, could not have recovered for his injuries

(for example, where barred by a statute of limitations, a release, or a judgment). The Court of Appeals refused to follow this rule because many of the cases so holding were based on "survival-type" rather than "true" wrongful death statutes. It reasoned that *Moragne* created a "true" wrongful death cause of action wholly apart from and not extinguished by the decedent's previous recovery for his personal injuries (463 F.2d p. 1332).

It is against this background that the language of Justice Brennan in *Gaudet* must be considered. The statement so strongly relied on by petitioner at 414 U.S. 591-592 did not mean to imply that Mrs. Gaudet might not have had a right to sue for loss of her husband's society had he lived, but rather to emphasize that the husband could not by his action bar a right solely vested in his wife.[3] The entire tenor of the *Gaudet* opinion makes it clear that permitting recovery for loss of consortium where a longshoreman or harbor worker is killed while denying it when he is maimed would be utterly illogical and unjust. In deciding to allow recovery for lost consortium, this Court said, 414 U.S. 587-588:

> "Thus, our decision to permit recovery for loss of society aligns the maritime wrongful death remedy with a majority of state wrongful-death statutes. But in any event, our decision is compelled if we are to shape the remedy to comport with the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."

Similarly, the decision to permit the spouse of an injured longshoreman to recover damages for lost society is compelled by that same humanitarian policy to grant rather than deny the remedy. Furthermore, the decision puts the maritime law in harmony with the overwhelming majority of American jurisdic-

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3. 414 U.S. 582, footnote 8.

tions which have passed on the question, as well as the Restatement of Torts.[4]

It should be noted that in pre-*Igneri* cases cited by petitioner such as *Pruitt v. M. S. Rigoletto,* 211 F.Supp. 295, and in the *Igneri* case itself, reliance was placed in the lack of a right in widows of seamen to recover for lost consortium as an element of damages for wrongful death. In its brief, petitioner first asserts (point IA) that the decision in *Gaudet,* a wrongful death case, has no applicability to maritime personal injury actions. Almost the entire remainder of the brief is devoted to an attack upon the *Gaudet* decision, and a discussion of other wrongful death cases. The close relationship between the right to consortium of a widow and that of a wife is compellingly obvious. As noted above, the petitioner in *Gaudet* relied on *Igneri* for its argument, rejected by this Court, that the maritime law does not recognize a right to recovery damages for loss of society.

Post-*Igneri* cases which denied recovery for lost consortium for a seaman's death relied on *Igneri. c.f. Petition of United States Steel Corporation,* 436 F.2d 1256 (1970); *Smith v. Olsen & Ungelstad,* 324 F.Supp. 578 (1971); *Valitutto v. D/S I/D Garonne,* 295 F.Supp. 764 (1969), all cited in petitioner's brief. Put in simplest terms, the legion of death cases denying consortium recovery on the basis of *Igneri* have done so on the reasoning that there can be no recovery for loss of a right which did not exist during decedent's lifetime. Conversely, if recovery is permitted, as in *Gaudet,* the right must have existed during decedent's lifetime. That is not "convoluted reasoning" as suggested by petitioner. It is logic.

As stated by this Court in *Moragne,* 398 U.S. at p. 406:

> "In most respects the law applied in personal injury cases will answer all questions that arise in death cases."

4. Section 693, comment d, page 496 Restatement of Torts, Second.

Furthermore, the decision in *Gaudet* refuted the various policy arguments offered to support the denial of all actions for loss of consortium, and thus indicated a general acceptance by this Court of this type of damage, without regard as to whether for personal injury or death.

POINT II

THE DOCTRINE OF *IGNERI* IS NO LONGER VALID LAW

If the common law changes, and if those changes are not inconsistent with the humane and liberal characteristics of maritime law, then maritime law, too, should change. This was the rationale of this Court in *Moragne,* when it said, 398 U.S. at p.388:

> "We need not, however, pronounce a verdict on whether *The Harrisburg,* when decided, was a correct extrapolation of the principles of decisional law then in existence. A development of major significance has intervened, making clear that the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law. This development is the wholesale abandonment of the rule in most of the areas where it once held sway, quite evidently prompted by the same sense of the rule's injustice that generated so much criticism of its original promulgation."

Thus, in *Moragne,* this Court placed great weight upon changes in the attitude of state courts and state legislatures toward the remedy. The parallel in the present situation is inescapable. Judge Friendly left the door open for change when he said in *Igneri,* 323 F.2d at pp. 259-261:

> " . . . At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would ap-

proach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. [Citation omitted.] So we turn to the common law."

If the Second Circuit were to turn to the common law today, they would find a completely different picture from the one which confronted them 17 years ago when *Igneri* was decided. Twenty-five more states have recognized a wife's right to recover for loss of her husband's society. New York, where Peter Igneri and Gilberto Alvez were seriously injured, is one of those states. *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498.

Judge Friendly was greatly influenced by the fact that the decision in *Hitaffer v. Argonne*, 183 F.2d 811 (D.C. App. 1950) cert denied 340 U.S. 852 was not met with widespread acceptance, 323 F2d 260-261). His survey revealed that out of the thirty-one American jurisdictions that considered the issue since *Hitaffer,* only twelve followed its precedent. Moreover, Judge Friendly misperceived this trend and considered it an indication that the common law considered consortium an anachronism (*id* at 264), and that the path to equality for women would be to meet a husband's claim as well.

He was also concerned that actions for consortium were "parasitic in nature," (*id* at 263) "too personal, intangible and conjectural to be measured in pecuniary terms by a jury" (*id* at 264) and finally that they were susceptible to double recovery. This Court concluded contrary to Igneri that the above fears were unfounded. Their inquiry disclosed that juries are quite capable in assessing the proper amount of damage[5] and in the

5. 414 U.S. at 589. The majority convincingly noted in support that juries had already been called upon to determine damages in such nebulous areas as pain and suffering for emotional injuries. Furthermore, juries have assessed damages for loss of consortium since the seventeenth century.

event of an overgenerous jury appellate tribunals would control excessive awards. Furthermore, *Gaudet* noted that the threat of double recovery was not realistic since each cause of action, the one for the injury and the other for the loss of consortium, were separate and independent. Clearly, each of the above arguments are equally applicable in actions for fatal as well as non-fatal injuries.

Petitioner's brief makes the startling assertion that Judge Friendly's decision to deny benefits to the wife of an injured longshoreman was based (exclusively) on analogy to the preclusion of a cause of action for loss of consortium by the spouse of a seaman under the Jones Act (p. 15). The reason for such a desperate argument is clear. That is the only basis of the Ignieri decision which has not been eroded away either by the subsequent changes in the common law or by the decision of this Court in *Gaudet.* However, petitioner simply ignores crucial language from the opinion of Judge Friendly:

p. 259-260

"Although New York's denial of a claim by a wife for loss of consortium is thus in no way decisive, it does not follow that reference to the common law generally is without relevance. Maritime law draws on many sources; when there are no clear precedents in the law of the sea, admirably judges often look to the law prevailing on the land. See Gilmore and Black, Admiralty (1957) §§ 1-16. At least this much is true. If the common law recognized a wife's claim for loss of consortium, uniformly or nearly so, a United States admiralty court would approach the problem here by asking itself why it should not likewise do so; if the common law denied such a claim, uniformly or nearly so, the inquiry would be whether there was sufficient reason for an admiralty court's nevertheless recognizing one. Compare the Harrisburg, 119 U.S. 199, 213-214, 7 S. Ct. 140, 30 L. Ed. 358 (1886). So we turn to the common law."

p. 263-264

". . . With loss of services eliminated, the wife's recovery would involve only such elements as the diminution of the value of her husband's society and affection and the deprivation of sexual relations and the attendant loss of child-bearing opportunity—elements which, it is argued, are too personal, intangible, and conjectural to be measured in pecuniary terms by a jury . . . "

p. 265

"With the common law authorities so conflicting and the opposing arguments so nearly in balance, we turn to an inquiry whether the historic common law position or the Hitaffer result comports better with other relevant elements of maritime law."

p. 267

"If there were evidence that maritime law generally recognized a claim for negligent injury to such an intangible right, or if the common law clearly authorized a wife's recovery, the gravitational pull of such concepts with respect to the wife of a longshoreman might be stronger than that of the analogy to the statute denying such recovery to a seaman's wife . . . "

How, in the face of such specific language from the very case which it relies on to support its challenge of the decision of New York's highest court, can petitioner expect this Court to accept its argument that developments in the common law of the various states is "not applicable to the issues presently before this Court?" It is a desperate argument. Judge Friendly specifically noted that the prevailing common law should be considered, but he found that the prevailing common law did not follow *Hitaffer*. In the thirteen years since the wife's right to recover for loss of her husband's consortium was first enunciated by the Court of Appeals for the District of Columbia, on-

ly 11 states[6] had followed suit, whereas 19 others[7] who had considered the question since 1950 had refused. It had been rejected by the Court of Appeals for the State of New York, *Kronenbitter v. Washburn Wire Co.*, 4 NY 2d 524 (1958). It was not the view expressed by the *Restatement of Torts.* Finding no evidence that the common law clearly authorized a wife's recovery, he found no reason for an admiralty court's nevertheless recognizing one.

How different the situation is today. A wife's right to recover damages for tortious invasion of her consortium is now recognized by 36 of the 50 states, as well as the District of Columbia, the Virgin Islands, and the territory of Puerto Rico.[8] Only five states which have considered the issue still deny the remedy.[9]

Today the *Restatement of Torts,* Second, recognizes *Hitaffer* as the prevailing view, contrary to its position when *Igneri* was decided. See Section 693, comment d, page 496.

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6. Arkansas, Delaware, Georgia, Illinois, Iowa, Michigan, Missouri, South Dakota, Montana, Nebraska and Oregon.

7. Alabama, Arizona, California, Colorado, Connecticut, Florida, Kansas, Kentucky, Maryland, New Hampshire, New Jersey, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Washington, West Virginia and Wisconsim.

8. The court below listed 34 states (A12-A13, Footnote 4). In addition, Hawaii, *Nishi v. Hartwell,* 473 P 2d 116 (Sup.Ct. of Hawaii 1970); Puerto Rico, *Gonzales v. Fireman's Fund Ins. Co.,* 385 F.Supp. 140 (D.C. Puerto Rico 1974); Virgin Islands, *Hubschman v. Antilles Airboats, Inc.,* 440 F. Supp. 828 (1977). *Connecticut, Hopson v. St. Mary's Hospital,* ____A2d____.

9. Kansas, South Carolina, Washington, West Virginia and Louisiana.

POINT III

THE COURT OF APPEALS WAS NOT BOUND TO FOLLOW *IGNERI*, BECAUSE IT IS NOT CONTROLLING FEDERAL LAW TODAY.

Thirty-eight years ago this Court was called upon to decide whether or not a cause of action for maritime personal injuries survived the death of the tort feasor, where the tort occurred within the territorial waters of a state whose law permitted survival of causes of action for personal injuries. In holding that the principle of non-survival was not so strongly entrenched in the maritime law to compel ignoring the state law, Chief Justice Hughes observed:

> ". . . With respect to maritime torts we have held that the State may modify or supplement the maritime laws by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation . . . . " *Just v. Chambers,* 312 US 383, 388, 61 S. Ct. 687, 691.

Assuming arguendo that *Moragne* and *Gaudet* did not overrule *Igneri,* what did this Court have to say about the general policy of the maritime law?

> "It better becomes the humane and liberal charcter of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *Sea-Land Services, Inc. v. Gaudet,* 414 US 573, 583. *Moragne v. States Marine Lines, Inc.,* 398 US 375, 387

Counsel for respondent and third-party defendant Vinal has suggested that the petition raises a first impression reverse *Erie R. Co. v. Tompkins,* 304 US 64 question. Under the doctrine of *Erie* federal courts must follow the decisions of a state's

highest court. In the absence of a ruling by the state's highest court, a federal court will be bound by the ruling of an intermediate court, unless there is persuasive evidence that the state's highest court would reject that ruling. *West v. American Telephone & Telegraph Co.,* 311 US 223 (1940), 61 S. Ct. 179. The opinion of the intermediate appellate court does not necessarily represent binding authority, even though the state's highest court has denied certiorari. *Graham v. White-Phillips Co.,* 296 US 74 (1935), 56 S. Ct. 15. Difficulty in determining what the state courts may thereafter determine the state law to be do not provide a reason for the federal court to deny jurisdiction. *Meredith v. City of Winter Haven,* 320 US 228 (1943), 64 S. Ct. 7.

When a federal court must determine state law, it should not slavishly follow lower court or even upper court decisions but ought to consider all the data the highest court of the state would use. *Roginsky v. Richardson-Merrell, Inc.,* 378 F 2d 832, 851 (2nd Cir. 1967), citing Corbin, *The Laws of the Several States,* 50 Yale L.J. 762 (1941). Even a determination by the highest court of a state need not necessarily bind a federal court, where later developments make it apparent that the decision no longer represents the law of the state. *Evans v. S. J. Groves & Sons Co.,* 315 F 2d 335, 341-345 (2nd Cir. 1963).

Finding a lack of unanimity among decisions concerning the question (A11) the court below properly examined the ratio decidendi of *Igneri* to see if it was still valid today (A12). In a careful and well reasoned decision, Judge Jason, speaking for the five member majority, employed logical analysis in justifying the court's departure from *Igneri* and *Christofferson.* He reasoned that the court was not bound by the older and more authoritative ruling in *Igneri* because subsequent developments had so eroded its theoretical underpinnings as to make it no longer valid law, and for the additional reason that the awarding of damages to a widow for loss of society had been approved by this Court in *Gaudet.* The lone dissent by Judge Jones was not based on any disagreement concerning the ultimate merit of

the majority's decision, but solely on the basis that the New York Court of Appeals did not have the power to rule otherwise than *Igneri* and *Christofferson,* which had been decided by federal courts. It was this conflict which counsel for respondent Vinal referred to as a reverse *Erie v. Tompkins* question.

The rationale underlying a federal court's freedom from mechanically following state court rulings is twofold. At least one commentator[10] has noted that unless federal courts are permitted to examine the same data a state court would examine when determining whether or not a relevant state court precedent reflects outmoded law, a litigant in a federal court would get second rate justice. It has further been observed that if federal courts were bound to apply a mechanical approach when determining state law, it would encourage forum shopping, since a litigant would know that in one forum there would be a strict adherence to stare decisis, whereas in the other the decision would be subject to the normal growth and development of the law. Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases, 67 Yale L.J. 187, 212 (1957).

The analogy between the *Erie* doctrine and maritime law is readily apparent because common to both systems and paramount in each is the prevention of the development of a dual system of federal and state substantive law within a given jurisdiction. Further is the desire to prevent forum shopping, *Guaranty Trust Co. v. York,* 326 U.S. 99, 109, and to insure that litigants rights will not be determined by the courthouse in which the case is heard, *Garrett v. Moore-McCormack Co.,* 317 U.S. 239 (1942). Because of the similarities between the two systems, it would appear to be logical that state courts should be afforded the same degree of judicial discretion when applying federal maritime law as federal courts applying state law in diversity cases. Under this analysis, state courts should be permitted to examine rulings by the highest arbiter of maritime law, this Court, to determine whether or not the otherwise dispositive intermediate court ruling still reflects valid maritime law, although it has not been expressly overruled.

10. *Corbin, supra.*

Giglio v. Farrell Lines, Inc., supra, Kozoidek v. Gearbulk Ltd., supra note 2, Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828 (D.V.I. 1977) were all scholarly opinions by district court judges declaring after careful analysis that the *Igneri* holding is outdated and should not be followed. Are the judges who authored these opinions, simply because they wear the federal robe, to be permitted the luxury of logical analysis, while state court judges are restricted to blind and mechanical application of stare decisis? The answer must be no.

POINT IV

THE DECISION OF THE COURT BELOW DOES NOT UPSET ANY POLICY OF UNIFORMITY OF THE MARITIME LAW TO THE DETRIMENT OF JONES ACT SEAMEN

It is apparent that since the decision of this Court in *Higginbotham,* uniformity of the maritime law is an illusory goal where remedies for seamen and harbor workers injured or killed aboard ship is concerned. When a worker is killed beyond the three-mile limit, his survivors are restricted to pecuniary losses, but where death occurs within the territorial waters of a state the liberal doctrine of *Moragne* applies. This naturally favors the survivors of longshoremen and harborworkers, who work on the territorial waters. The decision in *Higginbotham,* however, did not signal a retreat from the traditional solicitude of the maritime law for those injured within its jurisdiction. it was compelled, said the majority, by the fact that Congress by statute had limited damages under the Death on the High Seas Act to "pecuniary loss."

Where a particular area of the maritime law is not preempted by statute, Congress has left to this Court the task of fashioning remedies under the maritime law. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 20 (1963). Clearly, Congress has not enunciated any policy against the recovery of loss

of consortium by the wife of a living seaman or harbor worker. Petitioner's argument that Congress, by not changing the *Igneri* rule by legislation has in effect approved it *sub silentio*, was effectively and directly answered by this court in *Moragne*, 398 U.S. at 405:

> "To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law (citation omitted)"

One could as easily argue that since more than five years have passed since *Gaudet*. Congress has clearly approved of the result. The Congress acts only when people ask it to act. Theirs is a political process, depending to a great extent on who speaks to them with a loud voice. There are few to speak to them on behalf of injured maritime workers, many on behalf of shipowners. Wisely, they have left to this Court to stand as the bastion of the rights of all citizens where maritime matters are involved.

The substantive rights of seaman and of longshoreman have drifted apart in recent years, largely as a result of the 1972 amendments to the LHWCA, 33 USC 905 (b). No longer does a longshoreman or harborworker have the right to sue the shipowner for breach of the warranty of seaworthiness given to him by this Court in *Sea Shipping Co. v. Sieracki*, 328 US 85.[11]

11. Contrary to the assertion in petitioner's brief, there is no statement in the Sieracki opinion that the rights of longshoremen should never be greater than those of seamen. Indeed, one of the grounds of the dissenting opinion of Justices Frankfurter and Burton was that under the majority decision the non crew member would enjoy rights not accorded to members of the crew, for he would be entitled to indemnity under the warranty of seaworthiness plus benefits of the LHWCA not available to crew members, 328 US at 107.

For the blue-water seaman, on the other hand, the unseaworthiness doctrine has become the principal vehicle for recovery by seamen for injury or death, overshadowing the negligence action made available by the Jones Act. *Moragne v. States Marine Lines, Inc.*, supra, 398 US at 399.

The case principally relied on by petitioner for the proposition that wives of Jones Act seamen cannot recover for loss of their husband's consortium is *Christofferson v. Halliburton Co.*, 534 F2d 1147 (5th Cir. 1976), which involved injuries sustained by the husband while working as a seaman in Federal waters off the Louisiana coast. The decision was by a divided court, with a strong dissenting opinion. Rehearing was denied, with four judges dissenting, 542 F2d 1174.

Two things in particular are interesting to note about the majority opinion in *Christofferson*. The first is that in order to deny Mrs. Christofferson a remedy for loss of her husband's consortium, the majority found it necessary to declare that no such remedy exists under the law of Louisiana, (534 F 2d at page 1151). The implication is clear that had Christofferson been injured in New York, which permits a wife to recover such damages, Mrs. Christofferson would have been allowed to maintain her action.

The second aspect of the majority opinion in *Christofferson* which is of interest is that the court mentions its prior endorsement of *Igneri* in the case of *Canal Barge Co., Inc. v. Griffith*, 480 F 2d 1 (5th Cir. 1973),[12] a case decided after *Moragne* and before *Gaudet* in which the Fifth Circuit refused to allow damages for loss of consortium in a maritime wrongful death claim. Denial was based on *Igneri*, the Court stating, 480 F 2d at page 31:

> ". . . Igneri v. Cie de Transports Oceaniques, 323 F 2d 257, established that in actions under general maritime law to recover for personal injuries caused by both negligence and unseaworthiness, the spouse may not recover for loss of consortium, which was defined as 'the mutual right of the marriage partners to each other's society, companionship, and affection, including sexual intercourse' . . . "

There could hardly be a clearer statement that loss of consortium of a living spouse and that of a deceased one are inextricably interwoven. Before the appellate process was exhausted in *Canal Barge,* this Court handed down its decision in *Gaudet.* On rehearing, the Fifth Circuit remanded *Canal Barge* for a rehearing for determination of damages for loss of consortium, 573 F 2d 911 (1975).

The majority in *Christofferson* not only ignored the fact that their 1973 opinion in *Canal Barge,* which had relied so strongly on *Igneri,* was overruled by *Gaudet,* they stretched logic beyond its limits in rejecting appellants' arguments that *Igneri* had been shorn of its vitality by *Gaudet* and by the dramatic change in the common law over the intervening thirteen years. They quickly forgot how strongly they had relied on *Igneri* three years earlier in denying to a widow damages for loss of consortium. Instead, they seized upon two sentences from the *Gaudet* opinion, sentences quoted at pages 23-24 of petitioner's brief, as standing for the proposition that no right could arise for a wife to recover for loss of consortium until the injured longshoreman died.

The dissenting opinion of Judge Freeman quite accurately pointed out that the majority was reading too much into language which intended only to emphasize that the verdict which the deceased Gaudet had recovered before his death could not have encompassed those damages which were personal to the survivors. 583 F 2d at 1153-1154. The language in question, although incorporated in the *Gaudet* opinion immediately after the discussion of loss of society, probably refers more to accrual of the individual items of compensable loss included within that cause of action. Moreover, the Court's discussion of "loss of society" and decisions recognizing an independent action for "loss of consortium" indicates a clear awareness that the latter cause of action, if otherwise permissible, could clearly arise during the decedent's lifetime:

12. 534 F2d at page 1149.

> "Juries are often called upon to measure damages for pain and suffering, mental anguish in disfigurement cases, or intentional infliction of emotional harm. In fact, since the 17th century, juries have assessed damages for loss of consortium—which encompasses loss of society—in civil actions brought by husbands whose wives have been negligently injured. More recently, juries have been asked to measure loss of consortium suffered by wives whose husbands have been negligently harmed." 414 US at 589-590, 94 S. Ct. at 814.

The recovery for "loss of consortium" referred to clearly arises when husbands or wives are negligently "injured" or "harmed" and not merely when they are negligently killed.

INTEGRATION OF THE RIGHT TO RECOVER FOR LOST CONSORTIUM UNDER THE MARITIME LAW WITH THE LAW PREVAILING ON THE LAND

It would of course be ironic if the forward-looking and liberal remedy accorded to wives of those badly injured by a tortfeasor were to stop abruptly at the water's edge, in view of admiralty's traditionally liberal attitude toward those injured within its jurisdiction. More disruptive, however, would be the inconsistencies and confusion which can result from aplication of the *Igneri* rule. More and more, with the elimination of the protection of the warranty of seaworthiness, attorneys representing injured longshoremen and harbor workers are seeking new defendants on whom to fasten blame. Where latent defects of ship's gear or even of cargo-handling equipment provided by the stevedore causes injury or death, this formerly gave rise to a remedy against the vessel. *Petterson v. Alaska Steamship Co.,* 347 U.S. 396. Now, the only remedy for a latent defect will be a products liability claim against the manufacturer or suplier. Such a claim would be governed by state law, and as mentioned above under Point II, the overwhelming majority of states permit recovery for loss of a husband's consortium. Claims in the same suit are often asserted against the vessel owner and against

other defendants, such as manufacturers and suppliers and independent contractors. Consider the confusion in instructing a jury where different measures of damages apply against different defendants for the same injury.

Uniformity is promoted by bringing the maritime law in line with the *Restatement* and the clear majority of the states. Petitioner cites the case of *Consolidated Machines, Inc. v. Protein Products Corp.*, 428 F. Supp. 209 (MD Fla. 1976) as an example of "internal anomalies" created by *Gaudet*, asserting that the court permitted recovery for loss of society on behalf of those who died, while denying it to the spouses of those who were injured. This assertion (Petitioner's brief, p. 26) is somewhat misleading. Of the two living victims of the gas exposure, Parrish, who was seriously and permanently injured, was unmarried. The other man was not permanently injured, and the record is silent as to whether he was married or not. In any event, the court did not address the issue. Slightly altered, however, the fact situation points up the mischief created not by *Gaudet*, but by *Christofferson*. Since Florida has joined the overwhelming majority of states permitting the wife of a tortuously injured victim to recover damages for lost consortium, *Gates v. Foley*, 247 So. 2d 40, if Parrish had been married, his wife would have had the right to recover damages for lost consortium from the negligent designer of the fish processing plant, but not from her husband's employer. Such an anomalous result is avoided under the holding of *Alvez*. Similar factual situations frequently occur. cf. *Moll v. Southern Charters, Inc.*, 81 FRD 77 (EDNY 1979), cited by petitioner which contained three basic state law claims for relief, sounding in negligence, breach of warranty, and strict products liability.

RIGHTS OF WIVES OF JONES ACT SEAMEN

Petitioner claims that a Jones Act seaman's wife cannot recover for loss of consortium because, it argues, the Jones Act provides an "exclusive remedy" for such claims, and that act

provides for recovery only by "any seaman." In the first place, this argument ignores the seaman's remedy for injuries caused by unseaworthiness, *Mitchell v. Traveler Racer, Inc.*, 362 US 539 (1960), a remedy which has been recognized by this Court as "the principle vehicle" for recovery by seamen for injury or death. *Moragne, supra*, 398 U.S. at 399. In the second place, the "exclusive remedy" argument was rejected by this Court in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954).

In the *Cushing* case, representatives of deceased crew members of a tug, seeking to avoid the financial restrictions of the Limitation of Liability Act, 46 U.S.C. 183, sued the employer's underwriters under §§655 of the Louisiana Insurance Code (the so-called "direct action" statute) relying on diversity jurisdiction. The district court dismissed on the ground that application of the statute would work material prejudice to the characteristic features of the general maritime law and contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Addressing that argument, Justice Frankfurter said, 347 U.S. at 412:

> ". . . Nor need we be detained by petitioners' contention that as applied to claims against petitioners as underwriters of the charterer who employed the decedents, the State statute here conflicts with the Jones Act in that it would provide an alternative remedy where Congress has prescribed the means of recovery. Since that Act itself makes its remedy available to a seaman 'at his election' we perceive no conflict between the Jones Act and the Louisiana direct action statute"

See also *Just v. Chambers*, 312 US 383, where Florida was permitted to provide a remedy for death due to maritime torts in Florida waters, even though such a remedy was not permissible under maritime law and not available in some other states.

If, as argued by petitioner, the Jones Act provides no remedy for loss of consortium because of its use of the phrase "any seaman," such Act may not be construed to preclude a recovery for the wife of an injured seaman. This would explain

the fact that in *Jordan v. States Marine Corp.*, 257 F2d 232 (and in *Pruitt v. M.S. Rigoletto,* 211 F. Supp. 295) that there was no such right under the law of the state of the shipowner's incorporation. Perhaps it would also explain the finding in *Christoffersen* that the plaintiff wife had no right under the law of the state of Louisiana to recover for loss of consortium of her husband, although the opinion does not make clear whether the Louisiana law was considered because it was the state of defendant's incorporation or simply because it was the forum state. In the context of the instant case, it does not matter. Petitioner is incorporated in New York, the forum state which now recognizes such a right.

Surely, it cannot seriously be argued that the Jones Act, remedial legislation enacted to broaden the rights of seamen, was intended to stultify the growth of the general maritime law in a direction which would benefit seamen's wives. As this Court said in *Moragne* (referring to DOHSA):

> ". . . no intention appears that the Act have the effect of foreclosing any non-stationary federal remedies that might be found appropriate to effectuate the policies of general maritime law" 398 U.S. at 400

Thus, it can readily be seen that petitioner's assertion that the Jones Act proscribed any right on behalf of a spouse for loss of consortium is a completely unwarranted conclusion, just as was the assertion by the respondent in *Moragne* that Congress had proscribed any remedy for wrongful death in territorial waters other than the remedy provided by state wrongful death acts. Congress simply did not feel the need to legislate in that particular area sixty years ago. Today, an evolving and progressive common law—and maritime law—recognizes rights which did not exist long ago.

Furthermore, a strong case can be made that the Jones Act, a remedial statute which has traditionally been subject to liberal interpretation in favor of the seamen, is broad enough to encompass the seaman's spouse. One example of liberal construction is *Kernan v. American Dredging Company,* 355 U.S. 426, which involved a tugboat crew member killed as a result of the non-negligent violation of a Coast Guard regulation. Petitioner argued that the Jones Act was not the exclusive remedy for survivors of a seaman killed within territorial waters, and that she was entitled to the remedy of the state wrongful death act, which allowed recovery on the basis of unseaworthiness. Justice Brennan, writing for the majority, found it unnecessary to reach this question, holding that violation of a statutory duty even in the absence of negligence creates Jones Act liability.

The FELA, incorporated by reference into the Jones Act, clearly allows recovery where death is caused in whole or in part by the employer's negligence, or by reason of any defect or insufficiency, due to its negligence. Nevertheless, this Court took such language to include a non-negligent statutory violation, because:

> ". . . it is clear that the general congressional intent was to provide liberal recovery for injured workers. *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508-510, 77 S. Ct. 443, 449-450, 1 L. Ed. 2d 493, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

355 U.S. at 432.

In the light of the above expressed policy that the Jones Act is broad enough to include non-negligent statutory violations, is it not broad enough to embrace the spouse of an injured seaman?

POINT V

JUANITA ALVEZ' CLAIM IS NOT BARRED BY 33 USC 933(a)

Respondent Vinal, as third-party defendant, is allied in interest with petitioner on all issues involving damages. Obviously lacking confidence in petitioner's reliance on *Igneri,* Vinal asks this Court to reverse the New York State Court of Appeals on the basis of an argument never before advanced in this case, or, so far as can be determined, in any other. What is the basis of this remarkable argument? A section of the LHWCA entitled "election of remedies," enacted as an amendment in 1959 to relieve the employee from the burden of choosing between compensation and a third-party action, and a case, *Smither and Company, Inc. v. Coles,* 242 F2d 220 (D.C. App. 1957), which holds that the wife of an injured worker has no remedy against her husband's employer for loss of consortium as a result of a job-related injury. Neither the case nor the statutory section have any relevancy to the case at hand, where suit is brought against a third party. Without waiving any objection that the argument was not raised in the court below, a few comments would appear to be in order.

Though not clearly enunciated in Vinal's brief, the entire argument seems to rest on the premise that all rights of longshoremen and harborworkers (and their wives) derive from Congress. While this argument may have some validity where rights against the employer are concerned,[13] it is clear beyond cavil that the rights of longshoremen and harborworkers against the shipowner are rooted in the general maritime law. Although Congress, by enacting the LHWCA, cut off from longshoremen and harbor workers the right extended to them by judicial con-

13. But compare *Reed v. Yaka,* 373 US 412.

struction of the Jones Act to recover from their employer for negligence, they had not, until the enactment of 33 USC 905(b) in November 1972, been deprived of the protection given them with regard to the warranty of seaworthiness by this Court in *Sieracki* and in *Pope and Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953).[14] cf. *Moragnel v. Moore-McCormack Lines,* 75 F. Sup. 969 (D. Md. 1948). The LHWCA was not intended to take away from the longshoremen the traditional remedies of the sea against the vessel owner. *Reed v. Yaka,* 373 U.S. 412, 413.

As originally enacted, the LHWCA required a longshoreman or harborworker to elect between receiving compensation and commencing a third-party action. The 1959 amendment, relied on by Vinal in an attempt to defeat Juanita Alvez claim, was enacted to broaden the workers' rights and eliminate the onerous burden of that election. The section has been interpreted by this Court as not barring a stevedore from recovering from the shipowner in negligence. *Marine Terminals v. Burnside Shipping Co.,* 394 U.S. 404 (1969).

The LHWCA was modeled on the New York employees' compensation statute. *Banks v. Chicago Grain Trimmers Ass'n,* 390 US 459, 466 (1968), which has a provision similar to 933(a).[15] Under it, an action against a negligent third party by a non-dependent child is not barred. *De Clara v. Barber Steamship Lines,* 309 N.Y. 620, 132 N.E.2d 871 (1956). Indeed, since the decision of the New York State Court of Appeals in *Millington,* actions have been allowed by wives of seriously injured workers against negligent third parties in New York. c.f. *Rocha v. State of New York,* 77 Misc. 2d 290, aff'd 45 A.D.2d 633 (1974).

Neither *Igneri* nor *Pruitt v. M.S. Rigoletto,* supra, nor any case relied on by petitioner in its fifty-six page brief even men-

14. Now replaced by the duty of the owner of a ship in navigable waters to all who are aboard for purposes not inimical to his interests to exercise reasonable care. *Kermarec v. Compagnie Generale Transatlantique,* 358 US 625.

15. New York State Workmen's Compensation Law, Sec. 29-1.

tions the statutory section which Vinal claims is dispositive of the right of a spouse to recover the damages which were denied in those cases. Either the statute was not considered relevant by the shipowner or by the court. In any event, it should not bar the right of Juanita Alvez to recover for the lost consortium of her husband Gilberto.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

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